Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

NEW MEXICO TAXATION AND REVENUE DEPARTMENT,

Petitioner,

v.

RAMAH NAVAJO SCHOOL BOARD, INC., PATTERSON OIL CO., INC., and GUNDERSON OIL CO., INC.,

Respondents.

On Petition for Writ of Certiorari
To the New Mexico Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is state gasoline tax imposed on the purchase of gasoline by a non-Indian gasoline dealer from a non-Indian refinery off reservation preempted by the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* simply because the gasoline is subsequently resold to a tribal entity on a reservation with the cost of the tax passed on as one of the gasoline dealer's imbedded costs?

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PETITION FOR WRIT OF CERTIORARI

The New Mexico Taxation and Revenue Department petitions for a writ of certiorari to review the judgment that the New Mexico Court of Appeals entered in this case on March 4, 1999.

OPINIONS BELOW

The opinion of the New Mexico Court of Appeals is reported at ___ P.2d. ___ (N.M. Ct. App. 1999). Appendix ("App.") 1. The New Mexico Supreme Court's order denying review is reported at ___ P.2d. ___ (N.M. 1999). App. 26. The New Mexico First Judicial District Court's summary judgment order is unreported. App. 27.

STATEMENT OF JURISDICTION

On March 4, 1999, the New Mexico Court of Appeals entered the judgment from which review is sought. App. 1. On April 8, 1999, the New Mexico Supreme Court denied the petition for certiorari. App. 26. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY AND REGULATORY PROVISIONS

The Appendix contains pertinent portions of the New Mexico Gasoline Tax Act, §§ 7-13-1 to 7-13-18 NMSA 1978 (1993 Repl. Pamp.) (App. 29); the New Mexico Petroleum Products Loading Fee Act, §§ 7-13A-1 to 7-13A-6 NMSA 1978 (1993 Repl. Pamp.) (App. 31); the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* (1994) (App. 32); the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 481(a)) (App. 33).

STATEMENT OF THE CASE

Because revenues generated by taxation constitute the crucial lifeblood of any government, the United States Supreme Court has

been extremely reluctant to find federal preemption of state tax absent an express statement of preemption from Congress. Starting in 1965, the Court developed an exception to the requirement of express preemption solely with regard to state taxation of activities involving tribal entities occurring on tribal reservations.[1] This special Indian preemption-by-implication doctrine derived from unique considerations of Indian tribal sovereignty. It has never been applied to taxation of off-reservation transactions or to transactions not involving tribal entities. The New Mexico Court of Appeals below recognized this limitation on the Indian preemption-by-implication doctrine and properly rejected its applicability here. After all, the state gasoline tax and loading fee herein were imposed on transactions in which non-Indian gasoline distributors received and loaded gasoline from non-Indian refineries and pipeline terminals off-reservation. But the court then turned around and applied general *preemption-by-implication* standards to the Indian Self-Determination and Educational Assistance Act of 1975 ("Self-Determination Act" or "Act") to strike down the tax and fee. The New Mexico court found implied preemption because the gasoline, with the state tax as an imbedded cost, was subsequently resold to the Ramah Navajo School Board, Inc. ("Board") on the reservation, increasing the Board's cost over what the federal government's costs would have been. This weighing of federal and tribal interests against the state's interest is indistinguishable from the Indian preemption doctrine the court had purported to reject.

The New Mexico Court of Appeals' decision conflicts with this Court's rulings in two respects. First, in the sensitive area of

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[1] *See Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), for the origin of the doctrine and *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982) (*Ramah I*), for its further elaboration.

taxation, federal preemption will generally not be found by implication, but only through express provision by Congress. Second, this Court has explicitly held that the Self-Determination Act evinces no express or implied congressional intent to preempt state tax. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 183, n. 14 (1989).

A. Material Facts.

Gunderson Oil Co. and Patterson Oil Co. are non-Indian wholesale gasoline distributors in New Mexico. They bought gasoline off tribal lands at a refinery in Ciniza, New Mexico and at pipeline terminals in Albuquerque, New Mexico. The distributors then resold the gasoline to the Board by delivering it to the Board on the Ramah Navajo Indian Reservation. The state gasoline tax and petroleum products loading fee are imposed on the wholesale distributor's "receiving" and "loading" of gasoline at the rack at the refinery or pipeline terminal. The gasoline tax is imposed "for the privilege of receiving gasoline" in New Mexico under § 7-13-3 NMSA 1978 (1993 Repl. Pamp.). Section 7-13-2(K) NMSA 1978 (1993 Repl. Pamp.) defines "receiving" as a distributor's taking delivery of gasoline at a refinery or pipeline terminal in the state. The loading fee is imposed pursuant to § 7-13A-3(A) NMSA 1978 (1993 Repl. Pamp.) "for the privilege of loading gasoline . . . from a rack at a refinery or pipeline terminal in this state into a cargo tank." No state tax is imposed on subsequent resales of the gasoline.

Deductions from gasoline tax and loading fee pursuant to §§ 7-13-4(B) and 7-13A-4(B) NMSA 1978 (1993 Repl. Pamp.) are provided for "gasoline received in New Mexico sold to the United States or any agency or instrumentality thereof for the exclusive use of the United States or any agency or instrumentality thereof." There is no corresponding deduction from gasoline tax or loading fee when the gasoline is subsequently resold to any other sovereign, state or tribal.[2] Believing that the deduction for resale

[2]The legislature has amended § 7-13-4 to include a deduction for

to the United States applied, the distributors did not pay gasoline tax or loading fee on their receipt and loading of the gasoline they resold to the Board. Upon audit, the New Mexico Taxation and Revenue Department ("Department") assessed gasoline tax and loading fee on the distributors' receipt and loading of that gasoline. The distributors paid the tax and fee and filed a claim for refund with the Department.

The Board has long contracted with the Bureau of Indian Affairs under the Self-Determination Act to operate the Ramah Navajo School. Some of the gasoline was purchased by the Board for use in school buses. Most was resold to employees. The Board paid the passed-on cost of the tax and joined with the distributors in filing the claims for refund.

B. Proceedings Below.

The claim for refund was denied by the Department administratively because no provision of the Self-Determination Act expressly preempts — or even mentions — state tax and because the special Indian preemption-by-implication doctrine does not apply to off-reservation transactions between non-Indians. The distributors and the Board filed suit in Santa Fe County District Court to challenge that denial pursuant to § 7-1-26 NMSA 1978. The district court granted summary judgment upholding the tax. App. 27. The New Mexico Court of Appeals reversed. App. 25. It agreed the Indian preemption doctrine did not apply, but using general preemption standards, found the Self-Determination Act preempted the state tax anyway, *by implication*, because "its effect is to discourage conduct that federal action specifically seeks to encourage." App. 21. Noting the disparate effect of the deduction from tax and fee for gasoline subsequently resold to the United States, but not to tribes, the court ruled that the state tax made "it more costly for the Board to perform services

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sub-sequent sales to Indian tribes for their exclusive use. Laws 1997, ch. 192 , § 2.

than it would be for federal agencies to perform the same services." App. 21.

> There would be a clear and certain economic incentive for the Board to prefer that a federal agency, rather than the Board itself, perform those services — such as transportation of school children — requiring the use of gasoline. This incentive is contrary to a core purpose of the Self-Determination Act.

App. 22.

The court of appeals cited the portion of the Self-Determination Act that provided that Indian communities should not suffer funding reductions because of the transfer of services from the federal government to tribal agencies. 25 U.S.C. § 450j-l(a)(1) ("the amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the program or portions thereof for the period covered by the contract . . . ."). In spite of acknowledging that the special Indian preemption doctrine did not apply, the court of appeals used case law and policies from that doctrine "to guide us in discerning the meaning of specific statutes and 'inform the determination of whether the exercise of state authority had been pre-empted by operation of federal law.' *Bracker*, 448 U.S. at 144." App. 24. The court of appeals also relied on a case having nothing to do with Indian law. *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982), a foreign commerce case, used general implied-preemption standards to find that state tax imposed on activity upon which Congress had eliminated federal customs duties conflicted with the purpose of the federal enactments.

A petition for writ of certiorari was filed with the New Mexico Supreme Court. The court denied the writ on April 8, 1999. App. 26.

REASONS TO GRANT THE PETITION

1. The New Mexico Opinion Runs Directly Counter to Recent Supreme Court Decisions Resting the Legality of a State Tax on the Bright-Line Standards of Legal Incidence and Reservation Boundary.

Over the last decade, the Court has increasingly brought clarity and certainty into the area of state taxation affecting Indians. The Court has used the jurisdictional boundaries of tribal sovereignty — either the reservation or Indian Country — to mark special limitations on the authority of States to tax, and these limitations have been applied only to transactions involving tribes, tribal entities and tribal members. Sales to and by Indians on the reservation are thus immune from state tax. (Under *Warren Trading Post*, the Indian trader statutes preempt tax on any sale to an Indian on the reservation, even if the legal incidence is imposed on a non-Indian seller.) Sales not involving tribes or tribal members, however, and sales taking place off the reservation, are subject to state tax absent express preemption. *Arizona Department of Revenue v. Blaze Construction Co.*, ___ U.S. ___, 119 S.Ct. 957 (1999); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The balancing of interests test of *Ramah I* and *Bracker* has increasingly given way to bright-line standards based on the legal incidence of the tax and jurisdictional boundaries.

Recently, the Court has declined urging of both States and Tribes to re-engage in ad hoc decision-making, electing instead to rely on these bright line standards. In *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), Oklahoma argued for the imposition of its gasoline tax on gasoline sold on reservation by a tribal service station because the economic burden of the tax was borne by the non-Indian purchaser driving on Oklahoma state roads that were built and maintained through the gas tax. The Court rejected that suggestion and chose to maintain the legal incidence test, striking down the tax because it was imposed on the sale by a tribal entity on the reservation. The decision explicitly recognized the clarity provided by the legal incidence test: "our

focus on a tax's legal incidence accommodates the reality that tax administration requires predictability . . . . [A] legal incidence test . . . provides a reasonable bright line standard." *Id.* at 458-459. In this year's *Arizona Department of Revenue v. Blaze Construction Co.*, the Court rejected the entreaty of a contractor building roads on Indian reservations to apply the Indian implied preemption doctrine to strike down tax imposed on a transaction between the contractor and the federal government. The Court rejected application of the Indian implied preemption doctrine because no tribal entity was involved.

> The need to avoid litigation and to ensure efficient tax administration counsels in favor of a bright-line standard for taxation of federal contracts, regardless of whether the contracted-for activity takes place on Indian reservations.

Id. 119 S.Ct. at 960. The Court noted the "perils of a more fact-intensive inquiry." *Id.* at n. 3.

Both of these cases rejected an attenuated economic-burden analysis to determine whether a State's tax has some subsequent deleterious effect on a tribal or state interest. The Court focused instead on the identity of the parties to the transaction upon which the legal incidence of the tax was placed and the location — on or off-reservation — of that transaction. These decisions have helped bring a greater measure of certainty for States and businesses in imposing and paying tax.

The court of appeals' decision below throws that certainty out the window. Even after acknowledging that the special Indian preemption-by-implication doctrine does not apply, the court of appeals went on to use that doctrine as a "guide" in its decision to derive implied preemption of state tax from a statute devoid of any hint of a congressional intent to preempt, solely because the tax increased tribal costs. Now the uncertainty is greater than ever. Under the Indian preemption doctrine, only transactions involving tribal entities occurring on tribal lands were subject to implied

preemption of state tax. Under the court of appeals' decision below, tax imposed on any transaction occurring anywhere between non-Indians may be preempted if the passed-on cost of that tax increases some subsequent cost for a tribe. Every tax included as an imbedded cost in some tribal purchase can expect to face legal challenge.

2. The New Mexico Court's Use of General Preemption-By-Implication Standards With Regard to State Tax Outside the Indian Preemption Doctrine Conflicts With Decades of Settled Law.

This Court is quite aware of the kind of havoc such a ruling can bring to state tax systems. It has explicitly held in numerous cases that federal preemption of a state tax under the Supremacy Clause will be found only upon an express provision of federal law, not by implication, because of the crucial importance of taxation to the very existence of state governments. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 156 (1973) ("This Court has repeatedly said that tax exemptions are not granted by implication."); *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 606 (1943); *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939); *Trotter v. Tennessee*, 290 U.S. 354, 356 (1933). Just this year in describing any expansion of immunity from state tax beyond the constitutional doctrine of *United States v. New Mexico*, 455 U.S. 720 (1982), the Court placed special emphasis on the requirement that express action by Congress is necessary.

> For that immunity to be expanded beyond these "narrow constitutional limits," we explained that Congress must "take responsibility for the decision, by so *expressly* providing as respects to contracts in a particular form, or contracts under particular programs." 455 U.S., at 737, 102 S.Ct. 1373 (emphasis added)....

Blaze Construction Co., 119 S.Ct. at 959.

Significantly, many of the cases citing this need for express preemption of state tax have concerned state taxes affecting Indians. In developing the special Indian preemption standard in *Warren Trading Post* and its progeny, the Court has drawn with particular clarity the distinction between general preemption standards, requiring explicit preemption in the tax area, and the unique preemption-by-implication standard applicable to on-reservation transactions involving Indians. "The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law." *Bracker*, 448 U.S. at 143.

The decision below completely erases this long-held and frequently restated distinction. The New Mexico court simply ignored discussions of these differing preemption standards as explicated in cases involving state taxation and Indians. Although purporting to abjure the special Indian preemption doctrine, in fact the Court engaged in the same kind of balancing of interest characteristic of that doctrine.

3. The New Mexico Opinion Conflicts Directly With This Court's Decision in *Cotton Petroleum Corp. v. New Mexico.*

The New Mexico court professed to use general implied preemption standards to find that the Self-Determination Act preempts state tax here. Such a finding directly conflicts with specific holdings of this Court in prior decisions. Under general preemption standards, the intent of Congress is the ultimate touchstone of implied preemption. "The question of whether a certain state action is preempted by federal law is one of congressional intent." *Allis-Chalmers Corp. v. Leuck*, 471 U.S. 202, 208 (1985). This Court has already examined the Self-Determination Act in *Cotton Petroleum Corp.* to determine whether that Act preempted a tax imposed on non-Indians which potentially may affect tribal interests. The Court explicitly found

no congressional intent within the Self-Determination Act to preempt state tax. "Nor can a congressional intent to pre-empt state taxation be found in . . . the Indian Self-Determination and Education Assistance Act of 1975." *Cotton Petroleum Corp.*, 490 U.S. at 183, n. 14. The New Mexico Court of Appeals has presumed to overrule this Court. Unchecked, this conflicting lower court decision will breed error in other courts, shattering the certainty this Court has been carefully cultivating.

4. The New Mexico Court Misreads the Self-Determination Act to Find Preemption Where None Was Intended.

After wrongly dismissing controlling precedent in *Cotton Petroleum*, the court of appeals proceeded to misapply the general preemption standard to the Self-Determination Act. The court detected congressional intent through so-called "conflict preemption" where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1930). The court rested this conflict preemption on the assumption that if federal government, rather than the tribe, had run the school operation, it would have been able to buy the gasoline tax free. That difference supposedly made it more expensive in this single respect for the tribe to run the school than it would have been for the federal government. Because this single aspect was allegedly more expensive, the court of appeals concluded the Self-Determination Act preempted state tax. This unprecedented expansion of the preemption doctrine conflicts with settled law.

First, the very section upon which the court of appeals relied to find preemption specifies that the tribal organization is entitled to recover the full amount of the costs of the program. Section 450j-1(a)(3) includes as eligible costs for reimbursement to each tribal contractor "direct program expenses for the operation of the Federal program that is the subject of the contract." This provision explicitly allows the Board to get reimbursed both for the cost of the gasoline used on the school buses and for the state tax

imbedded in the cost of that gasoline, ensuring that the tribe is no worse off for having contracted to run the Ramah Navajo School under the Self-Determination Act. If the problem is BIA's refusal to reimburse the Board for the passed-on cost of the tax, that is a separate issue, and one Respondent is completely familiar grappling with. In that same section, § 450j-1(a)(2), Congress recognized that tribal organizations would have certain additional contract support costs that the federal agency would not have, and the tribal organization was entitled to reimbursement for those "indirect" costs. The BIA had also refused to reimburse Respondent properly for these indirect costs. Respondent took the BIA to court and won a substantial judgment. *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). That would have been the proper route here.

Secondly, the language the court of appeals relied on in that same section of the Act states that "the amount of funds provided under the terms of self-determination contracts . . . shall not be less than the appropriate Secretary would have otherwise provided for the operation of the program." 25 U.S.C. § 450j-1(a)(1). The court took this to mean that the tribe had to be treated by the state the same as the federal government vis-à-vis running the school program. But the cited provision has nothing to do with *expenditures,* only with *funding* the program. The Act requires that tribes not be penalized only insofar as funding for the operations is concerned. Nothing in the Act suggests that tribes are guaranteed that the *cost* of their operation of the school will be the same as the cost would be for the federal government.

In fact, the immediately preceding section of the Act specifically references this cost issue. Congress showed an understanding that some things would cost a tribal organization more than the federal government. For *certain* of those purchases, Congress provided that the tribe should be granted the same treatment as the federal government. *See* 25 U.S.C. § 450j(k) entitled "Access to Federal source of supply":

> For purposes of section 201(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 481(a)) (relating to Federal sources of supply, including lodging providers, airlines and other transportation providers), a tribal organization carrying out a contract, grant, or cooperative agreement under this subchapter shall be deemed an executive agency when carrying out such contract, grant, or agreement and *the employees of the tribal organization shall be eligible to have access to such sources of supply on the same basis as employees of an executive agency have such access.*

(Emphasis added.) When Congress wanted to say that the tribal organization was entitled to the same purchasing perks as a federal agency in spending its funds, Congress was able to do so clearly. It did not make this a general rule in the Act. Moreover, the Board did not take advantage of this provision here, although it could have procured gasoline from federal fuel yards as federal agencies do.

In any case, tribal costs will generally be lower than federal costs because of state tax consequences. A tribal organization carrying out a self-determination contract will gain state tax advantages that the federal government does not. For instance, anyone with whom the Board contracts for services on the reservation, such as a bus company hired to transport the school children, would be exempt from state gross receipts tax. *See Warren Trading Post; Ramah I*; *New Mexico Taxation and Revenue Department v. Laguna Industries, Inc.*, 115 N.M. 553, 855 P.2d 127 (1993). Federal contractors performing that same task would not be exempt from state tax. *Blaze Construction Co*, 119 S.Ct. at 960. Thus, as a rule, tribes running self-determination contracts will bear significantly less economic burden from state taxes than the federal government would. Do tribes really want to argue that the Self-Determination Act requires tribes and the

federal government always be treated equivalently with regard to state tax?

Finally, the subtext undergirding the court of appeals decision involves the legitimacy of treating tribes less advantageously for tax purposes than the federal government. The court of appeals decision implies that even in the absence of any express provision establishing a tax exemption, Congress intended that the Board should be treated equivalently to a federal instrumentality and endowed with every tax exemption available to the federal government. This conclusion flies in the face of a Supreme Court decision rendered just two years before Congress enacted the Self-Determination Act. In *Mescalero Apache Tribe v. Jones*, the Court held that tribes and tribal entities were not federal instrumentalities, and therefore were not entitled to the same tax exemptions for off-reservation transactions that would be available to the federal government doing the same act (running a ski area). Off-reservation preemption needs to be express. In 1975 when Congress passed the Self-Determination Act, it surely knew the significance of the *Mescalero Apache Tribe v. Jones* decision, but added no express preemption of state tax. The New Mexico court's interpretation of the Act directly contradicts the holding in *Mescalero* and is inconsistent with the provision in 25 U.S.C. § 450j(k) specifying under just what circumstances a tribal organization shall be given the same treatment the federal agency would receive from suppliers.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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July, 1999

APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Opinion Number: 1999-NMCA-050

Filing Date: March 4, 1999

Docket No. 18,909

RAMAH NAVAJO SCHOOL BOARD, INC., a Navajo Tribal Organization and School Board, PATTERSON OIL CO., INC., a New Mexico for profit corporation; and GUNDERSON OIL CO., INC., a New Mexico for profit corporation,

Plaintiffs-Appellants,

vs.

NEW MEXICO TAXATION & REVENUE DEPARTMENT, a State Agency; and JOHN CHAVEZ, individually and as Secretary of the New Mexico Taxation & Revenue Department,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT
OF SANTA FE COUNTY

Steve Herrera, District Judge

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OPINION
HARRIS L. HARTZ
Judge

{1} Few areas of the law generate as much controversy, complexity, and confusion as the scope of a state's power to impose taxes that impact Native Americans. Although the United States Supreme Court has written repeatedly on the subject–indeed, one of the leading cases involves the very parties before us in this case–no case decided by that Court is factually on all fours with this case, and it is difficult to determine which factual distinctions are of legal consequence.

{2} Ramah Navajo School Board, Inc. (the Board) is a Navajo tribal governmental entity which operates programs under the Indian Self-Determination and Education Assistance Act of 1975 (the Self-Determination Act), 25 U.S.C. §§ 450-458 (1998). Gunderson Oil Company, Inc., and Patterson Oil Company, Inc., are gasoline distributors which obtained gasoline from a non-Indian refinery off tribal lands in New Mexico and then delivered the gasoline to the Board on the Navajo reservation. The Board complains of two gasoline taxes assessed against Patterson and Gunderson and passed on to the Board. First, the Gasoline Tax Act, NMSA 1978, §§ 7-13-1 to -18 (1971, as amended through 1998), imposes a tax "[f]or the privilege of receiving gasoline" in New Mexico. NMSA 1978, § 7-13-3(A) (1995). Gasoline is "received" when a distributor takes delivery of the gasoline at a refinery or pipeline terminal. *See* NMSA 1978, § 7-13-2(N)(1)(b) (1993). Second, the Petroleum Products Loading Fee Act (the Loading Fee Act), NMSA 1978, §§ 7-13A-1 to -6 (1990, as amended through 1997), imposes a tax on distributors "[f]or the

privilege of loading gasoline . . . from a rack at a refinery or pipeline terminal in this state into a cargo tank." NMSA 1978, § 7-13A-3(A) (1990). The taxes were assessed for the audit period 1993-95. During that period the Gasoline Tax Act provided a deduction for "gasoline received in New Mexico sold to the United States or any agency or instrumentality thereof for the exclusive use of the United States or any agency or instrumentality thereof." NMSA 1978, § 7-13-4(B) (1991). Similarly, the Loading Fee Act provided an exemption for such sales. *See* NMSA 1978, § 7-13A-4(B) (1991). There was no similar deduction or exemption for sales to tribal entities, although the Gasoline Tax Act has since been amended to provide a deduction for those sales. See NMSA 1978, § 7-13-4(C)(1998).

{3} We hold that the fact that the economic burden of the taxes is ultimately borne by an Indian entity acting pursuant to the Self-Determination Act is not in itself sufficient to render the taxes preempted by the Act. Nevertheless, we hold that the taxes are preempted, at least in part, by the Act because the New Mexico statutes would not impose the taxes if the gasoline were ultimately sold to a federal agency performing the same services as the Board. The purpose of the Act is to encourage Indian entities to assume duties that would otherwise be performed by federal agencies. In particular, the Act mandates that the Indian entity should receive as much federal funding for performing the services as the federal agency would receive. The gasoline taxes undermine the Act to the extent that the Indian entity must bear the economic burden of taxes that would not be imposed if the services were performed by a federal agency.

I. *BACKGROUND*

{4} The origins of the Board are set forth by the United States Supreme Court in *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832, 834-35 (1982) (*Ramah I*). The Board operates the country's first independent Indian school in modern times. Until 1968 Ramah Navajo children had attended a public high school near the reservation. Then the State of New Mexico

closed the facility, leaving the children with the alternatives of either foregoing a high school education or attending distant federal Indian boarding schools. In response the Ramah Navajo Chapter established its own school board in 1970 and organized the Ramah Navajo School Board, Inc. Funded by the Tribe and the federal government, the Board reopened the school in the abandoned state facility. In 1972 the Board obtained federal funds to design and build a new school on the reservation.

{5} In the late 1980s the Board began the practice that generated the taxes in question. The Board installed gasoline storage tanks on its premises within the reservation and began to buy gasoline in bulk directly from distributors. In a typical transaction the Board would solicit bids from local distributors and receive bids the same day. It would then issue a purchase order for delivery of the gasoline to its storage tanks. The successful bidder would load the Board's order into a tanker truck at a nearby refinery and deliver the gasoline to the Board's tanks within twenty-four hours. About 28 percent of the gasoline purchased was used by the Board in its own vehicles or vehicles leased from the federal government. About 68 percent was sold at a discount to Board employees.

{6} Prior to 1993 the Gasoline Tax Act provided: "Any person paying the gasoline excise tax who in turn sells such gasoline to another, whether or not for use, shall include the tax as part of the selling price of the gasoline." NMSA 1978, § 7-13-3(C) (Repl. Pamp. 1990). Perhaps on the assumption that the legal incidence of the tax fell on the Board, the Taxation and Revenue Department (the Department) made no effort to collect the tax on gasoline delivered to the Board's storage tanks on the reservation. In 1993, however, the Act was amended by deleting the requirement that the tax be passed on as part of the selling price of the gasoline. It thus became clear that the legal incidence of the tax fell on the distributor upon receipt of the gas. The Department contends in its answer brief that imposing the tax at the distributor level reduces the number of taxpayers who report and pay the tax and also "ensures that all gasoline sold for use on New Mexico roads is

subjected to gasoline tax."

{7} The tax set by the Loading Fee Act is also imposed on the distributor upon receipt of gasoline. The tax was first enacted in 1990. The record and briefs do not explain why the tax was not assessed against Patterson and Gunderson before 1993 with respect to gasoline to be delivered to the Board. In any event, this tax apparently constitutes only a small portion of the total assessment.

{8} After an audit the Department assessed Patterson and Gunderson for taxes on gasoline sold to the Board. Gunderson paid the assessment, obtained reimbursement from the Board, and assigned to the Board its right to any refund. Patterson did not pay its assessment, but the Board made the payment and received an assignment of Patterson's rights to any refund.

{9} The Board then filed with the Department a claim for a refund. When the claim was denied, the Board sued in Santa Fe County District Court. Its amended complaint claimed that the tax was preempted by the Self-Determination Act, that the Board was owed a refund, and that it was entitled to declaratory and injunctive relief for violation of civil rights under 42 U.S.C. § 1983 (1998), as well as attorney fees under the companion statute, 42 U.S.C. § 1988 (1998). The Department filed a motion to dismiss the counts alleging causes of action under § 1983, and the motion was granted. The Board and the Department then both filed motions for summary judgment. The district court granted the Department's motion on September 24, 1997. On appeal the Board challenges the dismissal of the § 1983 claims, the grant of the Department's motion for summary judgment, and the failure to grant the Board's summary judgment motion. We affirm the dismissal of the § 1983 claims. With respect to the refund claim, we set aside the summary judgment in favor of the Department and remand to the district court with instructions to order refund of the taxes on gasoline used by the Board and to conduct further proceedings regarding whether to order a refund of the taxes on gasoline sold to Board employees.

II. *SECTION 1983 CLAIMS*

{10} Section 1983 provides a cause of action against any "person" acting under color of state law who deprives the plaintiff of a right guaranteed by federal law. *See Carter v. City of Las Cruces*, 121 N.M. 580, 582, 915 P.2d 336, 338 (Ct. App. 1996). The Board contends that the Department violated federal law by imposing on Patterson and Gunderson the taxes that were passed on to the Board. In the next section of this opinion we will address the merits of that contention. The dismissal of the § 1983 claims, however, was not based on the legality of the taxes. Even if the taxes violated federal law, the § 1983 claims could not be pursued.

{11} To begin with, a claim for damages (a refund of the tax) under § 1983 could not be pursued because only a "person" is liable under the statute. The word "person" in § 1983 does not include a state agency, nor does it include a state official sued for damages in his official capacity. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). The Board does not contest this point.

{12} Moreover, even though ordinarily state officials can be sued under § 1983 for injunctive or declaratory relief, *see id.* at 71 n.10, the United States Supreme Court held in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582 (1995), that a § 1983 action for injunctive or declaratory relief (and an accompanying claim for attorney fees under § 1988) will not lie with respect to imposition of a state tax if the state provides an adequate remedy at law. The district court here correctly ruled that NMSA 1978, Section 7-1-26 (1997) of the New Mexico Tax Administration Act, NMSA 1978, §§ 7-1-1 to -82 (1965, as amended through 1998), provides that adequate remedy. Section 7-1-26 authorizes filing of a claim for refund with the Department, filing a district court action if the claim is denied, and appealing an adverse district court decision.

{13} The Board raises three arguments why *National Private* should not apply. First, it contends that New Mexico does not provide an adequate remedy at law for challenging the taxes at issue. It points out that the Tax Administration Act does not permit it to challenge the tax because it is not a "taxpayer" under the Act. *See* NMSA 1978, § 7-1-3(V) (1997) (defining taxpayer). And it contends that the taxpayers subject to the tax in question – Patterson and Gunderson – lack standing to claim that the taxes are preempted by the Self-Determination Act because they are not tribes or tribal organizations covered by that Act.

{14} We disagree with this last contention and therefore reject the argument. Under the Tax Administration Act, Patterson and Gunderson have standing to challenge the taxes imposed upon them on any ground, including preemption under the Self-Determination Act. Standing under the Tax Administration Act is a matter of state law, and New Mexico has been generous in recognizing standing. *See New Mexico Right to Choose v. Johnson*, 1999-NMSC-005, ¶¶ 11-14, ___ N.M. ___, ___ P.2d ___; *Doe v. Roman Catholic Church*, 1996-NMCA-094, ¶¶ 16-39, 122 N.M. 307, 924 P.2d 273. New Mexico appellate courts have repeatedly considered claims by non-Indian entities that taxes were preempted by federal law relating to Indians, although the issue of standing was not addressed in the decisions. *See Blaze Const. Co. v. Taxation & Revenue Dep't*, 118 N.M. 647, 884 P.2d 803 (1994); *Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Div.*, 107 N.M. 399, 759 P.2d 186 (1988).

{15} We hold that taxpayers have standing under the Tax Administration Act to contest the constitutionality of taxes assessed against them. Patterson and Gunderson could thus argue preemption under the Self-Determination Act. When their claims were assigned to the Board, the Board thereby acquired the right to challenge the taxes on preemption grounds. Thus, the State has provided an adequate remedy at law for challenging the taxes in question.

{16} Second, the Board claims to come within an exception to the general rule set forth in *National Private*. A state procedure can be considered "inadequate," so that declaratory and injunctive relief under § 1983 would be appropriate, if the state engages in a repeated course of unconstitutional conduct after an adverse ruling. *National Private*, 515 U.S. at 591 n.6, described the exception as follows: "[I]f a state court awards a refund to a taxpayer on the ground that the tax violates the Federal Constitution, but state tax authorities continue to impose the unconstitutional tax, injunctive and declaratory relief might then be appropriate. In such circumstances, the remedy might be thought to be 'inadequate.' " This exception is inapplicable to the case before us. Prior to our decision today, no refund of the taxes at issue has been awarded by any court. Although the Board's amended complaint alleges that the State has continued to impose a tax that had been previously ruled unconstitutional, the allegation is based on the contention that the gasoline taxes at issue here are essentially identical to the gross receipts tax overturned in *Ramah I*. The *Ramah I* tax was a gross receipts tax imposed on a contractor building a school on the reservation under a contract with the Board. *See Ramah I*, 458 U.S. at 835. There is no allegation that the State has continued to impose the gross receipts tax improperly. Although the ruling in *Ramah I* is certainly relevant to our decision today, the taxes involved then and now are sufficiently distinct that the criteria for the *National Private* exception have not been satisfied. *National Private* permits injunctive or declaratory relief under § 1983 when "tax authorities continue to impose *the* unconstitutional tax." 515 U.S. at 591 n.6. (emphasis added). Because the State has not continued to impose the tax nullified by *Ramah I*, the general rule in *National Private* applies, thus barring a § 1983 claim.

{17} The Board's third argument is ingenious, but too much of a stretch. It states: "[P]roperly viewed, [the Board's] claim is not a claim for a refund of taxes at all but one for damages akin to tort damages for breach of a duty not to interfere in [the Board's] federally-sanctioned activities." We disagree with this characterization of the claim. The claim is a pure-and-simple claim

for a refund. Moreover, the policy behind the rule in *National Private* applies regardless of the characterization. That policy is to avoid judicial interference with tax collection outside the specific state statutory machinery for handling tax disputes, at least so long as that machinery provides an "adequate" remedy. *See id.* at 586-87, 589.

{18} Finally, we reject the Board's suggestion that *Ramah Navajo School Board, Inc., v. Bureau of Revenue,* 104 N.M. 302, 720 P.2d 1243 (Ct. App. 1986) (*Ramah II*), supports a cause of action under § 1983 in this case. Although that decision affirmed an award of attorney fees under § 1988 in a tax challenge, the decision predated *National Private*.

{19} Thus, we follow the general rule set forth in *National Private* and affirm the dismissal of the § 1983 claims.

III. *PREEMPTION UNDER THE SELF-DETERMINATION ACT*

{20} What we have before us, then, is judicial review under the Tax Administration Act of the Board's claim for a refund. The predicate for that claim is that imposition of the taxes in the specific circumstances presented is preempted by the Self-Determination Act.

{21} The United States Supreme Court has applied a different standard of preemption to federal statutes regulating Indian tribes than it has to other federal laws. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). This difference is justified largely by the "unique historical origins of tribal sovereignty." *Id.* "The Indian sovereignty doctrine . . . provides a backdrop against which the applicable treaties and federal statutes must be read." *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 (1973). Therefore, we begin our discussion with a brief treatment of tribal sovereignty.

A. *The Backdrop of Tribal Sovereignty*

{22} Long before the arrival of European settlers, the tribes were independent, sovereign nations. *See Worcester v. Georgia*, 31 U.S. 515, 542-43 (1832); Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 Ariz. L. Rev. 425, 426-27 (1998). In their conquest and settlement of this country, European governments, followed by our own government, entered into treaties with the tribes. These treaties recognized the special status of tribes and their dominion over specified territory. More than a century ago the United States Supreme Court stated that the tribes

> always have been . . . regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided.

United States v. Kagama, 118 U.S. 375, 381-82 (1886). The Supreme Court reaffirmed that view in 1980, *see Bracker*, 448 U.S. at 142, and earlier this decade it expressed the proposition as follows: "Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (internal quotation marks omitted). As a result, " '[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.' " *McClanahan*, 411 U.S. at 168 (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)).

{23} In the area of taxation, Indian sovereignty doctrine forbids "taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)

(*Jones*); *see Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (prohibiting state tax imposed on tribe for motor fuels sold by tribe in Indian country). There are, however, limits to tribal sovereignty. Tribes are not exempt from all state taxes, and reservations are not impenetrable havens from state taxation. For example, a state may tax tribal activities outside the reservation, *see Jones*, 411 U.S. at 157-58 (gross receipts tax on sales by tribal ski resort), and may impose a severance tax on natural resources extracted from Indian reservations by non-Indian lessees, *see Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989).

B. *The Preemption-by-Implication Doctrine*

{24} Given the longstanding policy of protecting Indian tribes from incursions by the states, federal statutes that regulate tribes have been interpreted expansively to preempt state laws that burden the aims of the federal statutes. In particular, "[a]mbiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Bracker*, 448 U.S. at 143-44. The Supreme Court has "rejected a narrow focus on congressional intent to preempt State law as the sole touchstone [and has] also rejected the proposition that preemption requires an express congressional statement to that effect." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (*Mescalero*) (internal quotation marks omitted). In applying this special preemption standard the Court has "examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Bracker*, 448 U.S. at 144-45. The examination calls "for a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* at 145. "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Mescalero*, 462 U.S. at 334. The New Mexico Supreme

Court has referred to this special preemption standard as the "federal preemption by implication doctrine." *Rodey*, 107 N.M. at 400, 759 P.2d at 187.

{25} Illustrative of this doctrine is the decision by the United States Supreme Court resolving a dispute between the same parties before us in this case. In *Ramah I* the Court held that federal law preempted a New Mexico gross receipts tax imposed on a construction company's receipts from the Board for construction of a school on the reservation. Preemption was found in the "comprehensive and pervasive" federal regulation of the construction and financing of Indian schools. *See Ramah I*, 458 U.S. at 839. Of particular importance was the codification in the Self-Determination Act of federal policy "encouraging the development of Indian-controlled institutions on the reservation." *Id.* at 840. The Court quoted the congressional recognition in 25 U.S.C. § 450(b)(3) that " 'parental and community control of the educational process is of crucial importance to the Indian people.' " *Ramah I*, 458 U.S. at 840. Under the Self-Determination Act the Secretary of the Interior had "promulgated detailed and comprehensive regulations respecting 'school construction for previously private schools now controlled and operated by tribes or tribally approved Indian organizations.'" *Id.* at 840-41 (quoting 25 C.F.R. § 274.1 (1981)). The Court then concluded:

> The direction and supervision provided by the Federal Government for the construction of Indian schools leave no room for the additional burden sought to be imposed by the State through its taxation of the gross receipts paid to [the contractor] by the Board. This burden, although nominally falling on the non-Indian contractor, necessarily impedes the clearly expressed federal interest in promoting the "quality and quantity" of educational opportunities for Indians by depleting the funds available for the construction of Indian schools.

Id. at 841-42.

{26} The history of the Ramah school also influenced the Supreme Court. In light of the State's abandonment of the Indian children, the Supreme Court said that the State could not justify the tax as being imposed "in return for the governmental functions it provides to those who must bear the burden of paying this tax." *Id.* at 843. The Court also held that the services provided by the State to the contractor for the contractor's off-reservation activities was "not a legitimate justification for a tax whose ultimate burden falls on the tribal organization." *Id.* at 844. The Court noted that the gross receipts tax was imposed "to compensate the State for granting 'the privilege of engaging in business[,]' N.M.Stat.Ann. §§ 7-9-3(F) and 7-9-4(A) (1980)," yet "the 'privilege of doing business' on an Indian reservation is exclusively bestowed by the Federal Government," not the State. *Id.* Finally, the State's "general desire to increase revenues" was "insufficient to justify the additional burdens imposed by the tax on the comprehensive federal scheme regulating the creation and maintenance of educational opportunities for Indian children and on the express federal policy of encouraging Indian self-sufficiency in the area of education." *Id.* at 845.

{27} Given this sweeping language in *Ramah I*, the Board naturally contends that the gasoline taxes here are preempted for the same reason. In the Board's view the essential elements of *Ramah I* were that the State was supplying no services to the school and the economic burden of the tax fell on the Board. Those features are likewise present with respect to the gasoline taxes involved in this case. In addition, the Board contends that the gasoline taxes here are indistinguishable in substance from the tax in *Ramah I*. Although the tax is imposed on the receipt of gasoline from the refinery by the distributor, Patterson or Gunderson, the Board argues that the purchase transaction should be looked at as a whole. From that perspective, it says, the tax is really being imposed on the delivery of the gasoline to the Board on the reservation. The tax in *Ramah I* was likewise imposed on an on-reservation transaction.

{28} Though the Board's argument is not without force, we must reject it. In *Rodey*, 107 N.M. at 400, 759 P.2d at 187, the New Mexico Supreme Court ruled that the preemption-by-implication doctrine does not apply to taxes imposed on non-Indians outside the reservation. In that circumstance, according to *Rodey*, there is no need to balance federal, state, and tribal interests. In particular, the economic burden of the tax is of no consequence. A tax is preempted only if there is "an actual conflict with an express federal provision." *Id.* at 402, 759 P.2d at 189.

{29} Following *Rodey*, we are not required by *Ramah I* to find the taxes here to be preempted. The tax at issue in *Ramah I* was imposed on a transaction on the reservation, so the preemption-by-implication doctrine applied. In contrast, the taxes in this case were imposed on the receipt of gasoline by non-Indians *outside the reservation*, so the doctrine is inapplicable.

{30} The Board argues vigorously that although the result in *Rodey* may be correct, the opinion erred in stating that the preemption-by-implication doctrine can never apply to a tax whose legal incidence falls on a non-Indian for an off-reservation transaction. It claims that *Rodey* is contrary to decisions by the United States Supreme Court and that on matters of federal law we must follow the United States Supreme Court, not the New Mexico Supreme Court.

{31} As a subordinate court, however, we must follow precedents of our state Supreme Court. *See State v. Manzanares*, 100 N.M. 621, 622, 674 P.2d 511, 512 (1983). In recent years we have been willing to predict that our Supreme Court would not follow one of its own precedents, but only when legal developments or scholarship strongly suggest the likelihood of such a reversal. *See, e.g., State ex rel. Martinez v. City of Las Vegas*, 118 N.M. 257, 259, 880 P.2d 868, 870 (Ct. App. 1994); *cf. Cheesecake Factory, Inc. v. Baines*, 1998-NMCA-120, ¶ 17, 125 N.M. 622, 964 P.2d 183 (declining to rely on Supreme Court

precedent that would likely be overruled). Those factors are not present here.

{32} The principal reasons that persuaded the *Rodey* Court still obtain. First, *Rodey* noted that the United States Supreme Court had never held that an off-reservation tax on non-Indians was preempted. *See Rodey*, 107 N.M. at 402, 759 P.2d at 189. That is still true.

{33} Second, *Rodey* relied on language by the United States Supreme Court emphasizing state authority over off-reservation activity by tribes themselves. In particular, *Rodey* noted the statement in *Jones* that "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state laws." *Rodey*, 107 N.M. at 402, 759 P.2d at 189 (quoting *Jones*, 411 U.S. at 148); *see also Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 162 (1980) (state power over Indian affairs is considerably more expansive off the reservation). In our view, the United States Supreme Court has not indicated any shift in this regard since our Supreme Court's decision in *Rodey*.

{34} We address, however, the Board's arguments that two more recent decisions of the United States Supreme Court undermine what was said in *Rodey*, at least in the context of this case. Those decisions are *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. 114 (1993), and *Chickasaw*.

{35} In *Sac & Fox*, 508 U.S. at 126-28, the Supreme Court struck down an Oklahoma tax on motor vehicles owned by members of the Sac and Fox Nation who lived and garaged their vehicles on the reservation. Although the tax was called an excise tax and the state argued that it resembled a sales tax – imposed on sales off the reservation – the Supreme Court looked behind the label. Various features of the tax convinced the Court that in essence the tax was a personal property tax imposed on Indian property located on the reservation. Changing the label of the tax made no legal difference.

{36} The Board contends that New Mexico is trying to do what Oklahoma was prohibited from doing in *Sac & Fox*. Prior to 1993 the Gasoline Tax Act required distributors to pass the tax on to purchasers of the gasoline. *See* § 7-13-3(C) (Repl. Pamp. 1990). In 1993 the Act was amended to delete that requirement, thereby making clear that the legal incidence of the tax falls on the distributor upon receipt of gasoline from the refinery. After the amendment the Department apparently felt free to assess the tax on gasoline ultimately destined for the Board's on-reservation storage tanks. According to the Board, the amendment changed nothing in substance, but was merely a maneuver to try to avoid preemption of the tax by the Self-Determination Act, just the sort of evasion foreclosed by *Sac & Fox*.

{37} But there is a difference between changing the label of a tax, as in *Sac & Fox*, and changing the legal incidence of the tax, as was done here. This is apparent from the Supreme Court's opinion in *Chickasaw*. The opinion addressed a motor fuels excise tax imposed on fuel sold–to Indians and non-Indians–by tribal retail stores on tribal trust land. *See Chickasaw*, 515 U.S. at 452-54. The Supreme Court held the tax unlawful because the legal incidence of the tax fell on the tribal retailer. The Court added, however: "[I]f a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian Tribes, the State generally is free to amend its law to shift the tax's legal incidence. So, in this case, the State recognizes and the Tribe agrees that Oklahoma could accomplish what it here seeks 'by declaring the tax to fall on the consumer and directing the Tribe to collect and remit the levy.' " *Id.* at 460 (quoting petition for certiorari). Clearly, changing the legal incidence of a tax can have legal consequences; in particular, it can be a means of avoiding preemption.

{38} Undaunted, the Board argues that *Chickasaw* actually supports its view. It reads *Chickasaw* as holding only that the legal incidence of a tax is determinative when the legal incidence falls

on the tribe. Otherwise, according to the Board, one applies the balancing test of the preemption-by-implication doctrine. It contends that the Supreme Court was only uttering dictum when it said that Oklahoma could accomplish its purpose by changing the legal incidence of its tax. It also suggests that the Court would give effect to removing the legal incidence from the tribe and imposing it on the non-Indian only if the economic burden of the tax already fell on the non-Indian, as was the case with respect to the gasoline tax in *Chickasaw*, which was imposed on tribal sales to non-Indians. If the Board's interpretation of *Chickasaw* is correct, then the preemption-by-implication doctrine applies to the gasoline taxes here, because their economic burden clearly falls on the Board.

{39} We disagree with the Board's interpretation of *Chickasaw*. Only one sentence in the opinion could be read as supporting the Board. The opinion states: "[I]f the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy." *Chickasaw*, 515 U.S. at 459. From this language, one might infer that if the legal incidence of the tax falls on an Indian or Indian tribe, the tax is always barred; but if it falls on a non-Indian, the standards of the preemption-by-implication doctrine which balances federal, state, and tribal interests apply, regardless of whether the taxed transaction occurs on the reservation. In other words, the balancing test applies off as well as on the reservation. Perhaps this is a proper inference, but we think not.

{40} The quoted sentence from *Chickasaw* must be read in conjunction with the preceding portion of the paragraph. The full passage states:

> The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax. If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside

> Indian country, the tax cannot be enforced absent clear congressional authorization. But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy[.]

Id. at 458-59 (citation omitted). As we read the passage, when the opinion mentions the balancing test, the Supreme Court was considering only sales in Indian country, not all sales everywhere. Although that limitation is not expressly noted in the sentence relied on by the Board, the limitation is implicit and, in our view, clear. If the Court were considering off-reservation taxes, one would expect the opinion to have qualified the assertion that a state cannot enforce a tax whose legal incidence falls on a tribe, by noting that such taxes can be proper off the reservation. *See Jones*, 411 U.S. at 157-58 (upholding state gross receipts tax on sales by tribe at off-reservation ski resort). The one case cited by the Court in support of the last sentence of the above quote was *Colville*, 447 U.S. at 154-57, which concerned a tax imposed on economic activity within Indian country. Moreover, throughout the *Chickasaw* opinion the Court sets Indian country as the context of its analysis. *See Chickasaw*, 515 at 458-60. This week's opinion in *Arizona Department of Revenue v. Blaze Construction Co.*, 1999 WL 100899 (US) (March 2, 1999), confirms our reading of *Chickasaw*. In *Blaze* the Court states that it has applied the balancing test "[i]n cases involving taxation of on-reservation activity . . . where the legal incidence of the tax fell on a nontribal entity engaged in a transaction with tribes or tribal members." *Id.* at 3.

{41} In short, we find nothing in *Sac & Fox* or *Chickasaw* that would call into question the view set forth in *Rodey*. On the contrary, *Chickasaw* could be read as supporting a bright-line test such as that in *Rodey*. In the following passage the United States Supreme Court explains the practical virtues of looking to the legal incidence of a tax, rather than its economic impact, in deciding whether it is preempted.

> Judicial focus on legal incidence in lieu of a more venturesome approach accords due deference to the lead role of Congress in evaluating state taxation as it bears on Indian tribes and tribal members. The State complains, however, that the legal incidence of a tax has no relationship to economic realities. But our focus on a tax's legal incidence accommodates the reality that tax administration requires predictability. The factors that would enter into an inquiry of the kind the State urges are daunting. If we were to make economic reality our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume–a complicated matter dependent on the characteristics of the market for the relevant product.
>
> By contrast, a "legal incidence" test, as 11 States with large Indian populations have informed us, "provide[s] a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority." Brief for South Dakota et al. as *Amici Curiae* 2.

Chickasaw, 515 U.S. at 459-60 (internal quotation marks and citations omitted from first paragraph). *Chickasaw* recognized a bright-line test to preempt a tax whose legal incidence falls on a tribal entity for on-reservation activity. Although the opinion does not expressly say that a bright-line test based on a tax's legal incidence is to be applied for determining whether an *off-reservation* tax is preempted, the rationale of *Chickasaw* certainly supports that approach.

{42} Finally, we disagree with the Board that, regardless of general doctrine, the United States Supreme Court decision in *Ramah I* itself requires us to hold that the taxes at issue here are preempted. We recognize that the *Ramah I* opinion expresses a dim view of the State's imposing a tax whose economic burden is

borne by the Board, when the State has abandoned its role in educating the Navajo children in the Ramah district. Nevertheless, *Ramah I* itself rested, at least in part, on the fact that the tax was imposed on activities occurring within the reservation. The opinion noted that the New Mexico gross receipts tax was imposed on "the privilege of engaging in business" and yet "New Mexico has not explained the source of its power to levy such a tax . . . where the privilege of doing business on an Indian reservation is exclusively bestowed by the Federal Government." *Id.* at 844 (internal quotation marks and citations omitted). The gasoline taxes, in contrast, are imposed "[f]or the privilege of receiving gasoline in this state," § 7-13-3(A), and "[f]or the privilege of loading gasoline . . . from a rack at a refinery or a pipeline terminal in this state," § 7-13A-3(A); and in this case all such receiving and loading occurred off the reservation, *see* § 7-13-2(N) (definition of "received" in Gasoline Tax Act). Unlike the situation in *Ramah I*, the tax is imposed on an off-reservation transaction.

{43} In short, following *Rodey*, and in line with our understanding of recent United States Supreme Court decisions, we hold that the preemption-by-implication doctrine does not apply to a tax whose legal incidence is upon a non-Indian for off-reservation activity. Hence, that doctrine does not require preemption of the taxes in this case.

{44} That is not to say, however, that the taxes are not preempted by the Self-Determination Act. Even if the special preemption-by-implication doctrine does not apply, preemption may be appropriate under more general standards. We now turn to that issue.

C. *General Preemption Doctrine*

{45} Unlike the standard applied under the preemption-by-implication doctrine, the general rule is that "broad and abstract federal goals [are] given scant preemptive effect." Laurence H. Tribe, *American Constitutional Law* § 6-26, at 489 (2d ed. 1988). State action is not preempted "where the most that

can be said is that the direction in which state law pushes someone's actions is in general tension with broad or abstract goals that may be attributed to various federal laws or programs." *Id.* at 487.

{46} But a court should find that state law is preempted "if it specifically frustrates fairly narrow and concrete objectives that underlie federal enactments." *Id.* (footnote omitted). "[S]tate action must ordinarily be invalidated if its effect is to discourage conduct that federal action specifically seeks to encourage." *Id.* at 482-83. In our view, that is the situation here. We hold that specific provisions of the Self-Determination Act preempt state taxes that make it more costly for the Board to perform services than it would be for federal agencies to perform the same services. Consequently, the taxes at issue in this case are preempted by the Self-Determination Act to the extent that the gasoline was sold to the Board for its exclusive use. As previously noted, the state statutes provided that the gasoline taxes would not have been owed in this case if the gasoline had been for the exclusive use of an agency or instrumentality of the United States.

{47} Before turning to the pertinent provisions of New Mexico's tax laws and the Self-Determination Act, we quickly dispose of an argument by the Department. The Department contends that a footnote in *Cotton Petroleum*, 490 U.S. at 183 n.14, asserts that the Self-Determination Act can never preempt a state tax. We disagree. The footnote must be read in context. The issue before the Court in *Cotton Petroleum* was whether there was preemption of a severance tax on oil and gas produced on a reservation, not preemption of all taxation. If *Cotton Petroleum* were saying that the Self-Determination Act can never preempt a state tax, the opinion should have said that the Court was overruling *Ramah I*, which had found such preemption of a gross receipts tax.

{48} The gasoline taxes at issue in this case are not imposed when the gasoline is destined for federal use. Section 7-13-4 provides in pertinent part:

> In computing the gasoline tax due, the following amounts of gasoline may be deducted from the total amount of gasoline received in New Mexico during the tax period, provided satisfactory proof thereof is furnished to the department:
>
> . . . .
>
> B. gasoline received in New Mexico sold to the United States or any agency or instrumentality thereof for the exclusive use of the United States or any agency or instrumentality thereof. Gasoline sold to the United States includes gasoline delivered into the supply tank of a government-licensed vehicle of the United States[.]

Similarly, Section 7-13A-4(B) states:

> Petroleum products sold to the United States or any agency or instrumentality thereof for the exclusive use of the United States or any agency or instrumentality thereof are exempt from the imposition of the petroleum products loading fee.

{49} During the assessment period, however, there was no such deduction or exemption for gasoline used by tribal instrumentalities. As a result, there would be a clear and certain economic incentive for the Board to prefer that a federal agency, rather than the Board itself, perform those services – such as transportation of school children – requiring the use of gasoline. This incentive is contrary to a core purpose of the Self-Determination Act. The very title of the Act conveys that message. And the Act gets more explicit: 25 U.S.C.A. § 450a(a) (1998) states:

> The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well

> as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

More importantly, Congress has provided that Indian communities will not suffer financially by the transfer of services from the federal government to tribal agencies. As stated in 25 U.S.C. Section 450j-1(a)(1) (1998), "The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract . . . ." Judge Wald described what the Act accomplishes as follows:

> The [Self-Determination Act] directs the Secretary, upon the request of an Indian Tribe, to turn over to that Tribe the direct operation of its federal Indian Programs. Once a Tribe requests control of its programs, the Secretary and the Tribe enter into a "self-determination contract," which the statute specifies must incorporate the provisions of a mandatory "model contract" included in the text of the [Act]. The Act requires the Secretary to provide to the Tribe the amount of funding that would have been appropriated for the federal government to operate the programs if they had not been turned over to the Tribe.

Ramah Navajo School Board, Inc. v. Babbitt, 87 F.3d 1338, 1341 (D.C. Cir. 1996) (citations omitted). The Act's purpose of providing tribes with the same funding that the federal agency would receive for the same service is undercut if the State imposes a tax that makes performance of the service more expensive for the tribe than for the federal agency.

{50} Perhaps the closest United States Supreme Court precedent is an opinion that had nothing to do with Indian law. *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982), dealt with goods shipped from Mexico and held in a customs warehouse in Texas pending export from the United States. To encourage such

arrangements, a series of federal enactments had eliminated duties on the goods involved. Xerox challenged a Texas personal property tax on the goods. The Supreme Court held that the tax was preempted. As summarized by Professor Tribe, the state tax "would manifestly discourage and indeed would financially penalize the very acts the federal law was meant to foster." Tribe, *supra*, § 6-26, at 484. The same words apply to the taxes before us.

{51} As if this were not already sufficient evidence of an irreconcilable conflict between New Mexico's tax and the core objectives of the Self-Determination Act, we are further informed by decisions like *Ramah I* and the federal policies favoring Indian self-governance that have been previously discussed. Although we have explained why, in our judgment, the preemption-by-implication doctrine does not mandate federal preemption under the specific facts of this case, the case law and federal policies supporting that doctrine nonetheless serve in a general way to guide us in discerning the meaning of specific statutes and "inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." *Bracker*, 448 U.S. at 144. When we read the Act we cannot ignore specific pronouncements in United States Supreme Court opinions interpreting the Act and applying it to this very school district. Accordingly, in construing the language of the Act requiring that tribes receive the same funding that a federal agency would receive for the same service, we are mindful of how *Ramah I* described the Act as a comprehensive and pervasive federal scheme to promote "tribal self-sufficiency in the area of education" through "Indian-controlled institutions." 458 U.S. at 840, 843. This background directs us toward a decision that the effect of this tax on the Board is irreconcilable with federal law.

{52} The precise scope of the preemption in this case is unclear, however. The New Mexico statutes provide a deduction or exemption from the gasoline taxes if the gasoline is "for the exclusive use of the United States or any agency or instrumentality thereof." Sections 7-13-4(B), 7-13A-4(B). According to the above analysis, the Board is entitled to a refund of taxes paid with respect

to gasoline purchased from Patterson or Gunderson for the exclusive use of the Board. But what gasoline was for the Board's exclusive use? Gasoline would qualify if used by the Board in its own vehicles or in vehicles it leased from the federal government. On the other hand, we question whether refund is appropriate for taxes on gasoline sold at a discount to Board employees. Perhaps we could decide as a matter of law whether the gasoline sold to employees qualifies. But because the issue was not specifically addressed by the parties in the district court, the better course is to remand.

CONCLUSION

{53} We reverse the district court judgment and remand for further proceedings consistent with this opinion.

{54} **IT IS SO ORDERED.**

HARRIS L HARTZ, Judge

WE CONCUR:
RUDY S. APODACA, Judge
RICHARD C. BOSSON, Judge

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
Thursday, April 8, 1999

No. 25,667

RAMAH NAVAJO SCHOOL BOARD, INC., a Navajo Tribal Organization and School Board, PATTERSON OIL CO., INC., a New Mexico for profit corporation; and GUNDERSON OIL CO., INC., a New Mexico for profit corporation,

Plaintiffs-Respondents,

vs.

NEW MEXICO TAXATION & REVENUE DEPARTMENT, a State Agency; and JOHN CHAVEZ, individually and as Secretary of the New Mexico Taxation & Revenue Department,

Defendants-Petitioners.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and responses, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied** in Court of Appeals number **18909**.

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT
By /s/ Jane Gurulé
Chief Deputy

APPENDIX C

FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

CIVIL NO. SF 96-1623(C)

RAMAH NAVAJO SCHOOL BOARD, INC., A Navajo Tribal Organization and School Board; PATTERSON OIL CO., INC., a New Mexico for profit corporation; and GUNDERSON OIL CO. INC., a New Mexico for profit corporation,

Plaintiffs,

v.

NEW MEXICO TAXATION AND REVENUE DEPARTMENT, a State Agency; and JOHN CHAVEZ, individually and as Secretary of the New Mexico Taxation and Revenue Department,

Defendants.

SUMMARY JUDGMENT

This matter having come before the court on defendant's motion for summary judgment, the court having reviewed the pleadings and heard argument of counsel, and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that summary judgment shall be granted to defendant.

/s/ Steve Herrera
JUDGE OF THE DISTRICT COURT

Submitted by:

/s/ Frank D. Katz
Frank D. Katz, Attorney for Defendant

Approved as to form only:

/s/ Michael P. Gross
Michael P. Gross, Attorney for Plaintiffs

APPENDIX D

STATUTES INVOLVED

1. The New Mexico Gasoline Tax Act, §§ 7-13-1 *et seq.* N.M.S.A. 1978 (1993 Repl. Pamp.) provides in pertinent part:

7-13-2. Definitions.

As used in the Gasoline Tax Act:

* * *

K. "received" means:

(1)

(a) gasoline which is produced, refined, manufactured, blended or compounded at a refinery in this state or stored at a pipeline terminal in this state by any person is "received" by such person when it is loaded there into tank cars, tank trucks, tank wagons or other types of transportation equipment, or when it is placed into any tank or other container from which sales or deliveries not involving transportation are made;

(b) when, however, such gasoline is shipped or delivered to another person registered as a distributor under the Gasoline Tax Act, then it is "received" by the distributor to whom it is so shipped or delivered; and,

(c) further, when such gasoline is shipped or delivered to another person not registered as a distributor under the Gasoline Tax Act for the account of a person that is so registered, it is "received" by the distributor for whose account it

is shipped;

(2) notwithstanding the provisions of Paragraph (1) of this subsection, when gasoline is shipped or delivered from a refinery or pipeline terminal to another refinery or pipeline terminal, such gasoline is not "received" by reason of such shipment or delivery;

(3) any product other than gasoline that is blended to produce gasoline other than at a refinery or pipeline terminal in this state is "received" by a person who is the owner thereof at the time and place the blending is completed; and

(4) except as otherwise provided, gasoline is "received" at the time and place it is first unloaded in this state and by the person who is the owner thereof immediately preceding the unloading, unless the owner immediately after the unloading is a registered distributor, in which case such registered distributor is considered as having received the gasoline;

* * *

7-13-3. Imposition and rate of tax; denomination as "gasoline tax".

A. For the privilege of receiving gasoline in this state, there is imposed an excise tax at a rate provided in Subsection B of this section on each gallon of gasoline received in New Mexico.

B. The tax imposed by Subsection A of this section shall be twenty two cents ($.22) per gallon received in New Mexico.

C. The tax imposed by this section may be called the "gasoline tax".

7-13-4. Deductions; gasoline tax.

In computing the gasoline tax due, the following amounts of gasoline may be deducted from the total amount of gasoline received in New Mexico during the tax period, provided satisfactory proof thereof is furnished to the department:

* * *

B. gasoline received in New Mexico sold to the United States or any agency or instrumentality thereof for the exclusive use of the United States or any agency or instrumentality thereof. Gasoline sold to the United States includes gasoline delivered into the supply tank of a government-licensed vehicle of the United States;

* * *

2. The New Mexico Petroleum Products Loading Fee Act, §§7-13A-1 *et seq.*, N.M.S.A. 1978 (1993 Rep. Pamp.), provides in pertinent part:

7-13A-3. Imposition and rate of fee; denomination as "petroleum products loading fee".

A. For the privilege of loading gasoline or special fuel from a rack at a refinery or pipeline terminal in this state into a cargo tank, there is imposed a fee on the distributor at a rate provided in Subsection C of this section on each gallon of gasoline or special fuel loaded in New Mexico on which the petroleum products loading fee has not been previously paid.

* * *

7-13A-4. Exemptions.

* * *

B. Petroleum products sold to the United States or any agency or instrumentality thereof for the exclusive use of the

United States or any agency or instrumentality thereof are exempt from the imposition of the petroleum products loading fee.

3. The Indian Self-Determination and Education Efficiency Act of 1975, 25 U.S.C. §§ 450 *et seq.* (1994), provides in pertinent part:

25 U.S.C. § 450j(k) Access to Federal sources of supply

For purposes of section 201(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 481(a)) (relating to Federal sources of supply, including lodging providers, airlines and other transportation providers), a tribal organization carrying out a contract, grant, or cooperative agreement under this subchapter shall be deemed an executive agency when carrying out such contract, grant, or agreement and the employees of the tribal organization shall be eligible to have access to such sources of supply on the same basis as employees of an executive agency have such access.

25 U.S.C. § 450j-1. Contract funding and indirect costs

(a) Amount of funds provided

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be

carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which –

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of –

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

* * *

4. The Federal Property and Administrative Services Act of 1949, § 40 U.S.C. 481(a) provides in pertinent part:

40 U.S.C. § 481. Procurement, warehousing, and related activities

(a) Policies and methods of procurement and supply; operation of warehouses

The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned –

(1) subject to regulations prescribed by the Administrator for Federal Procurement Policy pursuant to

the Office of Federal Procurement Policy Act [41 U.S.C.A. § 401 et seq.], prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, property identification and classification, transportation and traffic management, management of public utility services, and repairing and converting; and

(2) operate, and, after consultation with the executive agencies affected, consolidate, take over, or arrange for the operation by any executive agency of warehouses, supply centers, repair shops, fuel yards, and other similar facilities; and

(3) procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities, and perform functions related to procurement and supply such as those mentioned above in subparagraph (1) of this subsection: *Provided*, That contracts for public utility services may be made for periods not exceeding ten years; and

(4) with respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal and State regulatory bodies;

Provided, That the Secretary of Defense may from time to time, and unless the President shall otherwise direct, exempt the Department of Defense from action taken or which may be taken by the Administrator under clauses (1) to (4) of this subsection whenever he determines such exemption to be in the best interests of national security.

* * *